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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,) Case No. CR 14-00175 TEH
Plaintiff,)
v.) UNITED STATES' RESPONSE TO
PACIFIC GAS AND ELECTRIC COMPANY,) DEFENDANT'S SENTENCING MEMORANDUM
Defendant.) Date: January 23, 2017
) Time: 2:30 p.m.
) Courtroom: G, 15th Floor
) Judge: Hon. Thelton E. Henderson

1 The United States submits this Reply to defendant PG&E's Sentencing Memorandum to address
 2 the argument that the proposed conditions of probation functionally increase the punishment above the
 3 statutory maximum. Dkt. 906 at 19. PG&E makes this argument expressly with regard to the proposed
 4 mandatory advertising condition, *id.* at 24, and more obliquely with regard to the proposed community
 5 service condition, *id.* at 25.

6 "[T]he sentencing judge has broad discretion in setting probation conditions." *United States v.*
 7 *Mitsubishi Intern. Corp.*, 677 F.2d 785, 788 (9th Cir. 1982) (citing *United States v. Lowe*, 654 F.2d 562,
 8 567 (9th Cir. 1981)). These conditions must be "calculated to insure that the probation furthers the
 9 purpose of the criminal law." *Mitsubishi*, 677 F.2d at 788 (citing *United States v. Tonry*, 605 F.2d 144,
 10 148 (5th Cir. 1979). However, "the statutorily prescribed maximum sentence cannot be increased by
 11 the terms of probation." *Mitsubishi*, 677 F.2d at 788 (citing *United States v. Atlantic Richfield Co.* 465
 12 F.2d 58, 61 (7th Cir. 1972)); *see also United States v. Interstate Cigar Co.*, 801 F.2d 555, 556 (1st Cir.
 13 1986); *Fiore v. United States*, 696 F.2d 205, 209 (2nd Cir. 1982) ("[S]entencing courts may not impose
 14 conditions of probation that circumvent the statutory maximum penalties set by Congress.").¹

15 This means that the court cannot impose monetary penalties as conditions of probation that
 16 exceed the maximum fine allowed by statute. *United States v. CITGO Petroleum Corp.*, No. CRIM.A.
 17 C-06-563, 2012 WL 4127800, at *3-4 (S.D. Tex. Sept. 18, 2012) (rejecting condition of \$44 million
 18 "community service payment" to charities as a monetary penalty exceeding the maximum fine allowed
 19 by statute); *United States v. Southern Union Co.*, 942 F. Supp. 2d 235, 242 (D.R.I. 2013) (\$12 million
 20 "community service obligation" was a monetary penalty exceeding the statutory maximum). Put
 21 another way, "the Probation Act did not intend to authorize the district courts to direct the payments of
 22 funds, as condition of probation, beyond the express authorizations contained in § 3651. This is not to
 23 suggest, however, that a sentencing judge does not otherwise have broad discretion to impose conditions
 24 of probation reasonably related to protecting the public and rehabilitating the defendant." *United States*

25
 26 ¹ These cases were all decided based on a probation statute that has since been repealed, 18
 27 U.S.C. § 3651, which allowed a court to "suspend the imposition or execution of sentence and place the
 28 defendant upon probation. . . ." The law now in effect, 18 U.S.C. § 3653, authorizes various conditions
 of probation in addition to a fine, so long as they are reasonably related to the purposes of § 3553(a)(1)
 and (2).

¹⁰ *v. Perscon Corporation*, 695 F.2d 1236, 1243 (10th Cir. 1983).

2 None of the proposed probation conditions is a monetary penalty. That a condition may result in
3 some financial burden to a defendant does not convert it into a monetary penalty. In *United States v.*
4 *Danilow Pastry Co.*, 563 F. Supp. 1159, 1163-66 (S.D.N.Y. 1983), for example, a corporate offender
5 who manufactured pastries was ordered as a condition of probation to contribute pastries to charity. The
6 court recognized this condition as a form of community service. “Work in community service” is
7 expressly authorized by the statute governing discretionary conditions of probation, 18 U.S.C.
8 § 3563(b)(12). *Danilow* rejected the argument that this condition functioned as a monetary penalty:
9 “Any community service condition can be given a monetary value. . . . Such a construction would
10 severely impede judges from the ‘creative’ sentencing referred to in [*Mitsubishi*].” *Id.* at 1171.
11 Similarly, the proposed publicity condition – which the Sentencing Guidelines recommend for
12 organization defendants such as PG&E, USSG § 8D1.4 – does not constitute a monetary penalty even if
13 it may result in some financial burden.

As there is no monetary penalty beyond the fine, the proposed sentence falls within the statutory parameters. And every one of the proposed conditions of probation is tailored – uniquely and creatively, as corporate sentencing demands, *Mitsubishi*, 677 F.2d 785, 788 – to further the statutory purposes of sentencing: to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, afford adequate deterrence to criminal conduct, and protect the public from further crimes. 18 U.S.C. § 3553(a)(2)(A)-(C).

21 | Dated: January 13, 2017

Respectfully submitted,

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/s/

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